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February 27, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 16, 2008

Case Number: TSO-0675

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." ¹ For the reasons set forth below, I conclude that the individual's security clearance should not be restored. ²

I. BACKGROUND

The individual is employed by a Department of Energy (DOE) contractor and was issued a security clearance in connection with that employment. A routine reinvestigation of the individual in 2007 revealed information concerning financial and legal problems. Specifically, that information related to a civil judgement against the individual for the amount of \$2,776, several debts that had either been "charged off" or referred to a collection agency, and to a 2005 arrest by local law enforcement officers. Because this information cast into doubt the individual's continued eligibility for access authorization, the local security office (LSO) summoned him for an interview with a personnel security specialist in May 2008. The LSO determined that this Personnel Security Interview (PSI) did not resolve these doubts, and they informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The DOE introduced 14 exhibits into the record of this proceeding. The individual introduced two exhibits, and presented the testimony of two witnesses in addition to testifying himself.

II. THE NOTIFICATION LETTER AND THE DOE'S SECURITY CONCERNS

A. The Notification Letter

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (f) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Criterion (f) defines as derogatory information indicating that the individual "has deliberately misrepresented, falsified, or omitted significant information from . . . a Questionnaire for National Security Positions, . . . , a Personnel Security Interview [or] written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization" With regard to this criterion, the Letter states that during various PSIs, statements to investigators and Questionnaires for National Security Positions (QNSP), the individual gave four different dates, ranging from 1991 to 1995, for his commission of a felony involving improper sexual contact with his 13-year-old stepdaughter. The Letter also alleges that the individual provided false or misleading information on three QNSPs concerning his date of marriage to a former spouse.³

Pursuant to criterion (l), information is derogatory if it indicates that the individual "has engaged in any unusual conduct or is subject to any circumstances which tend to show that [he] is not honest, reliable, or trustworthy; or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation or duress which may cause [him] to act contrary to the best interests of the national security. Such conduct include[s], but [is] not limited to, criminal behavior [or] a pattern of financial irresponsibility" 10 C.F.R. § 710.8(l).

With regard to the individual's finances, the Letter states that the individual has demonstrated a pattern of not meeting financial obligations and has failed to commit to resolving his financial problems. Specifically, the Letter refers to statements that the individual made during two PSIs.

³ Under this criterion, the Letter also states that on the QNSP signed and dated September 14, 2006, the individual failed to report his places of residence for the "required ten year period" prior to that date, and to report a civil judgement and 12 delinquent accounts. However, the QNSP in question only required residence information for the previous seven years, which the individual provided. DOE Exhibit (Ex.) 9. Consequently, this first allegation is unfounded. Moreover, the second allegation was resolved in the individual's favor when the LSO learned that the individual was unaware of the judgement and the delinquent accounts at the time of the QNSP. NNSA Case Evaluation Sheet, DOE Exhibit 14.

During a 2001 PSI, the individual expressed an intention to file for bankruptcy within two to three months. According to the Letter, the individual's clearance was continued based upon his promise to resolve his financial delinquencies. However, the individual did not resolve them, and instead, continued to incur new debts. The letter further states that during the 2008 PSI, the individual again indicated that he would be filing for bankruptcy within the next couple of months. However, he said that he is still collecting bills to be included in the bankruptcy, and that he wants to include all of the bills that he can, since he will not be able to file for bankruptcy again for a certain number of years. The Letter also claims that during the 2008 PSI, the individual admitted that he writes checks or debits his account after depositing a check at an automatic teller machine (ATM), knowing that the money is not available for three days. Furthermore, the Letter cites the six DOE Security Acknowledgments that the individual has signed, which certified that the individual understood that demonstrating financial irresponsibility could raise doubt as to his continuing eligibility for access authorization, and states that, despite these certifications, the individual (i) filed for bankruptcy in 1983,⁴ (ii) has had two civil judgements totaling over \$4,000 levied against him, (iii) had his vehicle repossessed in 2003, (iv) had an IRS lien filed against him for failure to file tax returns, and (v) accumulated 17 delinquent accounts totaling more than \$20,000 which have not been resolved.

With regard to criminal activity, the Letter alleges that the individual (i) pled guilty in 1996 to two counts of Lewdness with a Minor Under 14 Years of Age, a felony, (ii) violated the terms of his sentence of probation for this conviction by failing to pay restitution on time and by continuously having contact with the victim and her family, (iii) was arrested in 2005 for Failure to Update Address within 48 hours as a Sex Offender, and is currently in violation of this requirement, and (iv) has been cited for Driving with a Suspended Driver's License and Driving with an Expired Registration twice each, and Driving with No Proof of Insurance four times. Finally, the Letter also cites the individual's failure to report his commission of the Lewdness felony until two years after he committed it, and his failure to report the 2005 arrest to the LSO.

B. The DOE's Security Concerns

The individual does not contest most of the allegations set forth in the Notification Letter.⁵ This derogatory information adequately justifies the DOE's invocation of criteria (f) and (l), and raises significant security concerns. Conduct involving lack of candor or dishonesty can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Moreover, criminal activity also creates doubts about a person's judgement, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply

⁴ Despite this allegation, I note that filing for bankruptcy, in and of itself, does not necessarily preclude the filer from obtaining or keeping a security clearance. Instead, in previous cases, Hearing Officers have examined the reasons that such filings have been necessary, and the efforts made to resolve the indebtedness. *See, e.g., Personnel Security Hearing*, Case No. VSO-0506 (2002).

⁵ However, he does dispute the DOE's claims that he has been, and currently is, in violation of the state sex offender registration requirement, and that he debited his checking account at a local bank, while knowing that the money in that account would not be available for three days.

with laws, rules and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E, F and J.*

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a “common-sense judgment . . . after consideration of all relevant information.” 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether restoring the individual’s security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual’s conduct; the circumstances surrounding his conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT AND ANALYSIS

At the hearing, the individual attempted to demonstrate, through his testimony and that of his co-worker and his daughter, that he did not deliberately provide false or misleading information to the DOE, that his financial problems did not result from irresponsible spending and do not make him a poor security risk, and that he is a reliable person who can be trusted to abide by security rules and regulations. However, after reviewing this testimony and the record in this matter as a whole, I conclude that, while the individual has adequately addressed the DOE’s security concerns under criterion (f), valid concerns remain under criterion (l). Therefore, the individual’s security clearance should not be restored. My reasons for these conclusions are set forth below.

A. Criterion (f)

At the hearing, the individual did not deny that he provided false information to the DOE concerning the date that he had sexual relations with his stepdaughter and the date that he married a former spouse. However, the evidence in this proceeding indicates that this was due to a poor memory on

the individual's part, and not to an attempt to mislead the DOE. Both of the individual's witnesses testified that he has great difficulty remembering dates accurately. Hearing Transcript (Tr.) at 26, 40. The individual's daughter indicated that, out of necessity, the individual has important dates, such as the birth dates of his children, written down on a list that he keeps in his wallet, and that, "when he goes to call my name, I get the dog, my brother, five people, and then" the daughter's name. Tr. at 40. The individual himself testified that he "do[es] not remember dates." Tr. at 46. Moreover, the fact that the individual has been married five times makes it more plausible that he could become confused as to the date of one of his marriages. DOE Ex. 9 at 15. Finally, it is difficult to discern what the individual would have to gain from intentionally deceiving the DOE in these instances, especially since he had previously provided the correct information to the DOE regarding his arrest and his marriages. DOE Ex. 11 at 6; DOE Ex. 5 at 21. I find that the individual has mitigated the security concerns under criterion (f).

B. Criterion (l)

I reach a different conclusion, however, with regard to criterion (l). Specifically, I conclude that the individual has failed to adequately mitigate the DOE's valid concerns regarding his finances and his past instances of illegal behavior.

1. Finances

The evidence produced at the hearing shows that the individual has suffered from, and continues to experience, severe financial difficulties. As of September 2006, the date of his last credit report, the individual had nine delinquent accounts and seven accounts that had been referred to collection agencies. Individual's Exhibit 2. The individual testified that his current debt was "in the tens of thousands of dollars." Tr. at 99. He further stated that his financial situation has essentially been the same since his 2001 PSI, which was occasioned, in part, by the financial problems that he was enduring at that time. Tr. at 102.

The evidence also shows, however, that these long-standing difficulties have largely been caused by his four divorces and by serious medical problems endured by himself and his current wife. With regard to the divorces, the individual has credibly stated that the attorneys' fees and diminution of household income that these events caused have been a substantial contributing factor to his dire financial situation. DOE Exhibit 2 at 3; DOE Exhibit 3 at 15; Tr. at 88. With regard to his health and that of his wife, the individual has stated that he suffers from Invasive Malignant Melanoma and his wife from Congestive Heart Failure, and that these afflictions have proven to be "extremely expensive," even with his health insurance. DOE Ex. 2 at 3; Tr. at 57, 117. He testified that his wife is routinely "in and out" of the hospital, and has been admitted "three times within the last six months. The first time . . . her bill came to \$47,333. My portion of that is \$4,000. The second time she was in the hospital, it was \$71,000. The third time she was in there . . ., they replaced her pacemaker, which is -- I can't believe -- \$300,000 for a pacemaker." Tr. at 52, 117-118. Although the individual's insurance also undoubtedly paid the great majority of these last two bills, it is obvious that the individual's medical expenses were, and are, severe. The individual's testimony in this regard is adequately supported by the testimony of his co-worker and his daughter, Tr. at 12, 36, and by the bill for the one of his wife's hospital visits, which was submitted as Individual's Exhibit

1. There is little or no evidence of irresponsible spending by the individual. Instead, the record indicates that the individual's financial problems were caused primarily by factors over which he had limited, or no, control.

As significant as this mitigating factor is, I nevertheless find it to be outweighed by the individual's inability or unwillingness to formulate a plan for resolving or erasing his indebtedness and by the related fact that the prospects for improvement in his financial situation in the foreseeable future are bleak. When asked if he had tried to set up some sort of a repayment plan with his creditors, he replied that he had not. Tr. at 112. He explained that what would sometimes happen is that creditors would call, and he would "offer them, 'I can pay you \$25 this month.'" *Id.* This falls far short of a plan for regular repayment that would offer some prospect of meaningfully addressing the individual's debts. Moreover, it is evident that the individual is not even fully aware of how large that debt is. After initially estimating it at "two or three hundred thousand" dollars, he then lowered the amount to "close to \$100,000," before finally providing a conservative estimate of "in the tens of thousands of dollars." Tr. at 98-99.

Also, the individual has demonstrated an inability or unwillingness to erase his debts by declaring bankruptcy. During his 2001 PSI, he stated that, due primarily to debts incurred as a result of his divorces and his legal problems, his intent was "to file bankruptcy" when he could "get the \$700 [in filing expenses] saved up." 2001 PSI at 19. Although the individual admitted that his financial situation has not improved since then, he testified that he still has not filed for bankruptcy, and will not file until he starts "getting pressured real heavy [*sic*] by creditors." Tr. at 54. This is because his wife's medical bills will continue to accumulate, and any of those bills that are incurred after the bankruptcy will not be covered by that filing. Tr. at 53-54. While these things may be true, it is also true that a large amount of debt, such as that burdening the individual, creates a correspondingly large vulnerability to financial inducements that could conceivably cause him to act contrary to the best interests of national security. Filing for bankruptcy would, at least temporarily, remove that vulnerability.

In the absence of any plan for reducing or eliminating the individual's debt, the prospects for improvement in the individual's finances and lessening of his vulnerability to improper inducements are poor. Indeed, the individual admitted that "the light at the end of the tunnel isn't there right now," and that he's "had these debts for a long time and it's apparent that . . . they are not going to go away." Tr. at 57-58. I therefore conclude that serious security concerns remain regarding the individual's finances.

2. Illegal Behavior

I further conclude that the individual has exhibited a pattern of illegal behavior that calls into question his ability or willingness to abide by security rules and regulations. In addition to his "guilty" plea to two felony counts resulting from voluntary sex acts that he engaged in with his 13 year-old stepdaughter in 1994, the individual did not file federal tax returns during a four-year period from 2003 through June 2007, DOE Exhibit 7 at 5, and has received a string of traffic-related citations for operating his motor vehicle without proper registration and proof of insurance, or with a suspended or revoked license.

At the hearing, the individual did not present any testimony or other evidence in mitigation of his illicit and licentious behavior with his minor stepdaughter. However, he did address the other allegations of illegal behavior set forth in the Notification Letter. He explained that he did not file his returns for the years in question because he was involved in a dispute with the IRS over whether he was responsible for taxes incurred, but not paid, by his current wife prior to their marriage. He added that he has now filed those returns, and has received a refund for each year. Tr. at 108-111. With regard to the traffic-related citations, he explained that on one occasion, his registration had expired because his vehicle could not pass inspection due to excessive emission of air pollutants. He was driving his vehicle from his house to an auto repair shop, a distance of about 200 yards, when he was stopped by police and issued a citation. He added that he chose to drive with the expired registration, rather than have the vehicle towed, as a means of saving money. Tr. at 84-85. Concerning his driving without proof of insurance, the individual testified that his financial problems sometimes made it impossible to keep up with his insurance payments, and that his coverage periodically lapsed. Tr. at 86. When this would happen, the insurance company would notify the state authorities, who would then also suspend the individual's drivers license. Tr. at 82.

These explanations are insufficient to mitigate the DOE's security concerns. As an initial matter, the fact that the individual was involved in a dispute with the IRS over whether he should have to pay his wife's tax debts did not absolve the individual of his legal obligation to file his federal returns in a prompt manner. Although he has now filed those returns, for several years, he was not in compliance with the legal requirement that he file his federal tax returns. Concerning the traffic citations, the individual stated during the 2008 PSI that he could have obtained a temporary registration to get his vehicle repaired, but he did not feel like taking the time to do that, and instead chose to drive with an expired registration. DOE Ex. 3 at 96. Furthermore, although I find credible the individual's assertion that his financial problems made it impossible to consistently maintain his insurance payments, there is nothing in the record to indicate that he could not have taken public transportation or obtained transportation from a friend or relative during periods of lapsed insurance coverage. Indeed, he testified that he was taking these measures at the time of the hearing because he did not have a valid driver's license. Tr. at 80. If the individual's 1994 misdeeds with his stepdaughter had been the only significant examples of illegal behavior on his part, I could possibly have concluded that the security concerns raised by these acts had been mitigated by the passage of time. However, the individual's more recent behavior demonstrates a disturbing, and continuing, willingness to disregard legal requirements, and calls into question his ability to abide by security rules and regulations. This concern is validated by the individual's failure to report his 2005 arrest to the LSO as required by DOE regulations. The individual has failed to adequately address the DOE's security concerns under criterion (I).⁶

⁶ The individual did, however, satisfactorily address some of the DOE's other allegations under this criterion. With regard to the allegation that the individual violated the sex offender registration requirements, the individual testified that at the time of his arrest, he had two residences: one at which his in-laws and children lived and at which he received his mail, and another that he rented after his wife suffered a heart attack and could no longer negotiate the stairs at the other residence. When he was arrested in 2005, his driver's license had the new address, but his registration with the state was at the old address. The charge of failure to update his address as a sex offender was
(continued...)

V. CONCLUSION

Although the individual has successfully addressed the DOE's security concerns under criterion (f), he has not produced adequate evidence in mitigation of the DOE's concerns under criterion (l). I therefore conclude that he has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the individual's security clearance should not be restored. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Senior Hearing Officer
Office of Hearings and Appeals

Date: February 27, 2009

⁶(...continued)

dismissed for insufficient evidence. *See* stipulation of DOE Counsel, Tr. at 79. Concerning the allegation that the individual violated his probation by failing to pay restitution and continuing to have contact with the victim and her family, I am convinced that the individual's financial troubles made full restitution impossible. Furthermore, I found convincing the individual's testimony that the allegedly improper contact came as a result of the fact that his son, with whom he had visitation rights, continued to live with his former wife and the stepdaughter. Tr. at 89.